NECESSITY AS A DEFENCE FROM CRIMINAL RESPONSIBILITY - A COMPARATIVE STUDY

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PREFACE

"Necessity as a defence from criminal responsibility - a comparative study" has been choosen as a topic for this dissertation. As a comparative study, three laws are involve i.e English law, Malaysian law and Shariah law. The purpose of this dissertation is to highlight the differences and similarities of such defence under those three laws. It is my hope that this study will be able to provide a better understanding on the subject.

I am indebted to many people in completing this dissertation. My gratitude and appreciation goes to my supervisor Tan Sri Syed Agil Barakbah, my lecturers Assoc. Prof. Qaiser Hayat and Ustaz Mohamed Abu Bakar for their suggestions and assistance.

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INTRODUCTION

In every legal system, a person will be liable for any act done which is against or in breach of any law in existence. A person will be criminally responsible for any crime committed. The law of crime provides that an act does not make any person guilty of a crime, unless his mind be also guilty, in Latin this principle is known as "actus non facit reum nisi mens sit rea". In other words, before a man can be convicted, two elements is necessary to be proven by the prosecution i.e actus reus (criminal act) and mens rea (criminal intention).

Generally a person is presumed to know the nature and consequence of his act and therefore is responsible for it. However the law provides some exceptions where a man may be excused from the crime committed. This can either be on the ground of the absence of a requisite mens rea for the commission of a crime, or on some other ground recognized by the law. Thus a person who does acts which exactly fit the definition of an offence is not necessarily liable to be convicted of that offence.[1]

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[1] J.C Smith, The Hamlyn Lectures (Fortienth Series), Justification and Excuse in the Criminal Law, 1989, 1.

Most penal laws have outlined several defences which the offender can raise to escape liability. Some maybe called exculpatory, because if successful they show that the defendant was not guilty of the offence charged at the time when he acted. Other defences are not exculpatory in this sense, although all defences if successful result in an acquittal on the charge in question[2]. There are variety of defences discussed by the law, for instance, insanity, intoxication, minority, consent, duress, necessity etc. Some penal law have allocated these defences under a chapter known as General defences.

Nevertheless, this dissertation only concerns the liability of a person who contends the defence of necessity. The scope of study covers necessity as a defence from criminal responsibility, discussed under the English law, Malaysian law and the Shariah. Separate chapter is allocated for each law.

The first chapter discusses the defence of necessity under the English law. The writer also provides a brief history of necessity, theory and elements of necessity as well as a discussion on whether necessity is a general defence or not.

Necessity under the Malaysian law is discussed in the second chapter. Under the Malaysian law, the

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[2] Glanville William, Theory of Excuses [1982] Crim L.R. 732.

discussion is based on s.81 of the Penal Code and several decided cases.

The third chapter is about necessity as provided by the Shariah. In this chapter, the writer explains the meaning of necessity, its basis, condition and limitation. Opinion of the Muslim jurists regarding the rule of necessity is also mentioned.

And in the final chapter, the writer highlights the similarities and dissimilarities concerning the defence of necessity which can be seen from the three laws discussed.

CHAPTER I

NECESSITY UNDER THE ENGLISH LAW

1.0. A BRIEF HISTORY

Necessity as a defence has always been an issue among the Common law jurists. The extent of the application is quite vague. Jurists are reluctant to recognize it as they are afraid that it might be subversive. They suggest that such defence only exist impliedly in statutory offences which have the terms like 'unlawful', 'without lawful excuse' and 'without reasonable excuse'. The reluctance of the courts to recognize a defence of necessity in practice means that any discussion of the practical consequences of recognizing this defence must appear theoretical.[1]

The defence of necessity had only been directly raised in the late nineteenth century in a case of Dudley and Stephen[2] where the court held that the deliberate killing of an unoffending and unresisting man (boy) howsoever great the temptation existed cannot be

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1 Glanville Williams, Theory of Excuse (1982) Crim.L.R. 732 at 739.

2 (1884) 14 Q.B 273.

justified by necessity. And this has been a subject of discussion among the English jurists after that. However, necessity as a defence was not first time mentioned in Dudley and Stephen, because earlier jurists had already commented on it. In Reniger v Fogossa (1550), S. Pollard said:

> "In every law, there are somethings which when they happen, a man may break the word of the law, and yet not break the law itself and such things are exempted out of the penalty of the law, and the law priviliges them although they are done against the letter of it, for breaking the words of the law is not breaking the law, so long as the intent of the law is not broken. It is a common proverb; God necessitas non habet leegem (necessity knows no law)".[3]

Lord Bacon, a traditional jurist asserted in Whorton Law Lexicon that a man who steals to satisfy his hunger is not guilty of larceny, and if two shipwrecked persons get on the same plank but finding it not able to save them both, one of them thrusts the other from it whereby he is drowned, this is said by Lord Bacon and others to be justified but such is not the law of England.[4] The jurists unwillingness to discuss this kind of defence,

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[3] quoted from GAUR, Criminal Law Cases And Materials, 114 (1985).

[4] K.B Abbas, The Right of Private Defence, 280.

may be due to the difficulty in defining it as Sir James Stephen in History of Criminal Law said;

> "it is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that the people maybe justified in breaking it, but these cases cannot be defined before hand".[5]

Glazebrook claimed that there is a principle of statutory interpretation,

> "that it requires clear and unambiguous language before the courts will hold that a statutory interpretation was intended to apply in which more harm will, in all probability, be caused by complying with it than by contravening it".[6]

He asserted that by this principle the courts will, instead say that 'on its proper construction' the provision was not intended to apply to such a case. For instance in Burns v Nowell[7], where question arose whether the captain of a ship had committed an offence contrary to section 3 of the Kidnapping Act 1872 in carrying in his vessel without a licence, native labourers from the South Sea Islands, other than as crew. The Act had been

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5 Ibid.

6 P.R Glazebrook, The Necessity Plea in Criminal Law [1972 A] C.L.J 87 at 93.

7 (1880) Q.B.D 444.

passed after the fishing was over and when the natives were carried back to theirhomes in accordance with their contracts of employment. The Court of Appeal affirmed the judgment that there is no action against the defendant. The court, inter alia held that

> "had he (the captain) put the natives on shore at the island nearest to him at the time when he first heard of the Kidnapping Act, he would not only have broken his contract with them, but would have been guilty of an act of cruelty in all probability as great as any which it was a vowed object of the Act to prevent. For these reasons, we have come to the conclusion that the carrying of the native labourers on board was not under the circumstances to which we have referred... consequently... was not at the time of her seizure employed in the commission of any offence within such intent and meaning".

The existence of such principle had been doubted by Smith (a writer) who comments that if such principle do exist, it has given little notice by the judge of modern times.

In 1974, the working party of Law Commission proposed that a general defence of necessity is to be introduced into English law. Nevertheless, this proposition has been rejected by the Law Commission, who further provides that if such defence had already existed

at the Common law, it should be abolished. They felt that allowing such a defence to a charge of murder could effectively legalise euthanasia in England.[8]

Later in 1985, the Criminal Code Team disagreed with the Law Commission's proposal to abolish such defence. According to the team, the judges should continue to develop the defence as far as it exists in Common law and it also seek recognition for the defence of necessity which closely analogous to duress per minas or known as duress of circumstances. Duress of circumstances means the persuasion to break the law comes from the surrounding circumstances.

During the twentieth century the scenario changed when the defence of necessity received recognition by several common law countries like Australia, Canada and most recently by the English courts themselves. For example in R v Loughnan [9](an Australian case), the court held that there is no general rule giving rise to a defence of necessity, but in case of great and imminent danger, in order to preserve life the law permits an encroachment on private property. And in a Canadian case of Perka et al v The Queen,[10] the Supreme Court of Canada had given full consideration to the defence of necessity. Dickson J., said;

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8 Clarkson and Keating, Criminal Law: Text and Materials, 340 (1984).

9 [1981] V.R. 443.

10 [1984] 13 D.L.R (4th) 1.

> "Generally speaking, the defence of necessity covers all cases where non-compliance with law is excused by an emergency justified by the pursuit of some greater good".

Whereas in England, the Court of Appeal held that necessity can be a defence to a charge of reckless driving when duress of circumstances had been established.[11]

And later in R v Martin[12] the Court of Appeal had confirmed that the defence of necessity in extreme circumstances is recognised by the English law.

Thus by passing of time, the defence of necessity begins to be discussed by the Courts of England with certain conditions and requirements imposed.

1.1. THEORY OF NECESSITY

Necessity normally happens in situation where the defendant had to choose between two evils. When the defendant choose the lesser evil but at the same time he had to break the letter law, he is said to be acting under necessity.In such a case, the alternative is not a threat from another person but some other happenings or circumstances. In the words of Glazebrook;

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[11] R. v. CONWAY [1988] 3 All E.R. 1025.

[12] [1989] 1 All E.R. 652.

> "The essence of the necessity situation is that the defendant had he chosen to, could have complied with the letter of the law, but decided not to do because he thought that such compliance would in all probability result in a harm or evil as great or greater than that which would ensure from doing (or omitting to do) what prima facie is prohibited (or commanded).[13]

This means the law has to be broken in order to achieve a greater good because the evil of obeying the law is socially greater in the particular circumstances than the evil of breaking it. The accused commits the actus reus of a crime with the prescribed mens rea, but has done so with the motive to avoid a greater evil.

Stephen in Digest of the Criminal Law described the principle of necessity as;

> "An act which would otherwise be a crime may in some cases be excused if the person accused can show that it was done only in order to avoid consequence which could not otherwise be avoided, and which, if they had followed would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than

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[13] Supra note at 88.

was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided".[14]

The Canadian Law Reform Commission explained that in necessity, he (a person) may sometimes promote a value supported by the law and contravene the letter of the law to secure some greater good for example an unlicensed motorist drives an emergency case to hospital to save life; at other times he may fail to promote such a value but may avoid harm to himself at the expense of an innocent person or of contravention of the law for example a shipwrecked sailor saves himself by repelling another from a plank sufficient only to carry one.[15] The conduct of a person under necessity promotes some value higher than the value of the literal compliance with the law.

1.2 DEFENCE OF NECESSITY

The law has provided some circumstances where it is not a crime for a person to cause harm or injury to other persons or property belonging to others. This happens in cases like self-defence, duress etc.

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[14] C.R. William, Brett and Waller's, Criminal Law; Text and Cases 566 (1983).

[15] Stanley M.H Yeo, Compulsion in the Criminal Law, 28 (1990).

Apart from this, some jurists had recognised the defence of necessity in extreme circumstances which arises from objective danger threatening the accused. Whether the defence of necessity exists in English Criminal Law as any other defences like self-defence, duress, insanity etc has been discussed by the English jurists. Among the few statutory provisions laying down general principles of liability or excuse there is none which comprehends a defence of necessity and so commentators have inevitably looked to the case law for an answer to the question.[16]

Professor Glanville William however, had confidently submitted that the defence of necessity is recognised in English law and he added "The peculiarity of necessity as a doctrine of law is the difficulty or impossibility of formulating it with any approach to precision".[17]

Two views can be found on this matter. First view claimed that there is no defence of necessity, whereas the second view said that such a defence do exist though there were not many cases which explained about it.

In Stratton,[18] former members of Governor's Council of Madras were prosecuted for a common law misdemenour in

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16 Supra note 6, at 87.

17 Glanville William, Criminal Law: The General Part, 728 (2nd ed)(1961).

18 (1779) 21 How St Tr 1045, quoted from Supra note 6, at 108.

assaulting and imprisoning the governor and themselves assuming the government of the settlement. Their offences consisted, simply in interfering in the government of Madras without lawful authority. Lord Mansfield C.J., conceded that if the situation created by the governor had been such that "immense mischief would have arisen" if the defendant had "waited for the interposition of the council at Bengal or....for (that of) of the directors of the East India Company here (in London)" so that their actions had been necessary "to preserve the settlement of Madras to the company, and to the English Crown" they would have an answer to the charges. The question he said was simply "whether there was that necessity for the preservation of the society and the inhabitants of the place as authorises private men....to take possession of the government". If there was, the case would be analagous to one of acting in defence of person or property and they should be acquitted.

In Vantandillo,[19] the Court of King's Bench held that;

> "although the court has not found upon its records any prosecution for this specific offence, yet there could be no doubt in point of law that if a person unlawfully, in juriously and with full knowledge of the fact, exposes in a public highway a person infected

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[19] (1815) 4 M & S 73, quoted from supra note 6 at 109

> with a contagious disorder, it is a common nuisance to all the subjects and indictable as such".

In this case the defendant's counsel had asked "might not a mother carry her infected child through the street in order to procure medical advice without being subject to being indicted for it?" and Lord Ellenborough L.J., had relied;

> "....if there had been any such necessity as supposed for the conduct of the defendant, it might have been to say that necessity given in evidence as matter of defence , but there was no such evidence, and as the indictment alleged that it was done unlawfuly and injuriously it precluded the presumption that there was any such necessity".

This shows that if the defendant abled to bring forward evidence that the mother carried the child with contagious disease under the pressure of necessity, the mother might have been acquitted. Decisions from these two cases showed that the court would recognised the defence of necessity in extreme circumstances.

Some jurists referred necessity as duress of circumstances and it has been accepted as a defence. In R

v Willer,[20] the appellant was charged with reckless driving, after he had driven very slowly on a pavement in order to escape from gang of youth who were obviously intent on doing violence to him and his passengers. At his trial, he wished to put forward the defence of necessity, but the trial judge ruled that the defence was not open to him. He consequently changed his plea to guilty and sentence was passed. He later appealed against the conviction, claiming that the judge erred in a ruling that the defence of necessity was not available to the appellant and also that a material irregularity had occured in that the appellant had been sentenced before the jury delivered their verdict. On appeal Watkin L.J., said;

> "We feel bound to say that it would have been for the jury to decide, if necessity could have been a defence at all in those circumstances, whether the whole incidents should be regarded as one or could properly be regarded as two separate incidents so as to enable them to say that necessity applied on one instance but not in the other. For that reason alone, the course adopted by the assistant recorder was we think seriously at fault. Beyond that upon the issue of necessity we see no need to go for what we deem to have been appropriate in these

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20 (1986) 83 C.A 225.